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IN THE

Supreme Court of the United States

October Term, 1984

PITTSBURGH & LAKE ERIE
RAILROAD COMPANY,

Petitioner,

vs.

HOWARD H. HUMPHRIES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
SUPERIOR COURT OF PENNSYLVANIA

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Question Presented

Whether Rule 238, Pa. R. Civ. Pro., which provides for the award of prejudgment interest on certain jury verdicts applies in a Federal Employers' Liability Act case tried in state court?

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judgment interest, or "delay damages," under Rule 238, Pa. R. Civ. Pro.[1]

After briefing and oral argument the trial court awarded the requested interest. The Petitioner then appealed the trial court's ruling to the Pennsylvania Superior Court. In a lengthy and well-reasoned opinion that appellate court affirmed the award. A Petition for Reargument was filed with the Superior Court but was summarily denied. Thereafter a Petition for Allowance of Appeal was filed with the Pennsylvania Supreme Court which Petition was likewise denied. The within Petition for a Writ of Certiorari was then filed with this Honorable Court.

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[1] Pennsylvania Rule of Civil Procedure No. 238 provides, in pertinent part:

> [I]n an action seeking monetary relief for bodily injury, death, or property damage, or any combination thereof, the court or the arbitrators . . . shall
>
> (1) add to the amount of compensatory damages in the . . . verdict of the jury . . . damages for delay at ten (10) percent per annum, not compounded, which shall become part of the award, verdict, or decision;
>
> (2) compute the damages for delay from the date the plaintiff filed the initial complaint in the action or from a date one year after the accrual of the cause of the action, which ever is later, up to the date of the award, verdict, or decision
>
> * * *
>
> Except as provided in subdivision (3), damages for delay shall be added to the award, verdict, or decision against all defendants found liable, no matter when joined in this action.
>
> * * *
>
> (e) If a defendant at any time prior to trial makes a written offer of settlement in a specified sum with prompt cash payment to the plaintiff, and continues that offer in effect until commencement of trial, but the offer is not accepted and the plaintiff does not recover by award, verdict, or decision, exclusive of damages for delay, more than 125 percent of the offer, the court or arbitrators shall not award damages for delay for the period after the date the offer was made.

Summary of the Argument

As a matter of federal law, the application of Rule 238 to the instant case was correct. The said local rule may, at the discretion of the court, be incorporated as part of the federal general interest statute, 28 U.S.C. §1961. In this case the decision to so incorporate Rule 238 was proper because Pennsylvania's prejudgment interest rule furthers the underlying purpose of the FELA to provide for liberal recoveries by (a) providing complete recovery for plaintiffs who have been forced to exist without admittedly due monies for some time prior to trial; (b) establishing some equality of recovery among injured workers by eliminating delay as a factor effecting the total value of an award; and (c) discouraging railroads from prolonging litigation, thereby denying justice to the employee and generally frustrating the courts' attempts to efficiently administer their business. Furthermore, the fact that Rule 238's application may encroach somewhat on the uniformity of the results obtained under the Federal Employers' Liability Act is not a sufficient reason to vacate the Superior Court opinion because lack of uniform results in federal causes of action is part and parcel of our federalist system.

Alternatively, as a matter of local law, Rule 238 was properly applied to this case. The said rule may be interpreted as one which concerns purely matters of procedure, not substantive rights of the litigants, and as such it would be controlling here since all matters of procedure are admittedly governed by local law when a Federal Employers' Liability Act case is tried in state court.

ARGUMENT I

The matter of whether Pennsylvania's prejudgment interest rule, Rule 238, Pa. R. Civ. Pro., may be applied to a Federal Employers' Liability Act, 45 U.S.C. §51 *et seq.* (hereinafter referred to as the FELA) case tried in one of that Commonwealth's courts of original jurisdiction is not an easily resolved issue. On the contrary, it is one which raises fundamental questions concerning the underlying relationship between the federal and state court systems, a relationship which since the time of *Erie Railroad Company v. Tompkins*, 304 U.S. 64, 58 S. Ct. 1817, 82 L.Ed. 188 (1938), has not been amenable to the fashioning of a clear definition. It comes as no surprise, therefore, that a difference of opinion exists among both federal and state courts as to whether prejudgment interest may be awarded in an FELA case.[2] Despite this lack of consensus your Respondent submits that the within Petition should be denied because the holding of the Pennsylvania Superior Court is supportable on either of two independent bases, one asserted by the court itself, the other not relied upon but equally persuasive. Each of these bases will be discussed below.

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[2] For example, at the state level various courts have refused to grant such interest, see *Murman v. New York, N.H. & H.R.*, 258 N.Y. 447, 180 N.E. 114 (1932); *Wicks v. Central Railroad Co. of N.J.*, 129 N.J. Super. 145, 322 A.2d 488 (1974); *Felder v. Union Pacific Railroad Co.*, 660 P.2d 911 (Colo. App. 1982); *Bennett v. Atchison, T & S.F. Ry. Co.*, 174 N.E. 805 (Iowa, 1919); whereas the Pennsylvania Superior Court in the instant case has granted prejudgment interest. At the federal level, *Garcia v. Burlington Northern R.R.*, 597 F.Supp. 1304 (D.C. Colo. 1984) granted prejudgment interest in an FELA case, while such interest has recently been denied in *Camplese v. Consolidated Rail Corporation*, 594 F.Supp. 44 (M.D. Pa. 1984) and *Carver v. Consolidated Rail Corporation*, 600 F.Supp. 125 (E.D. Pa. 1984).

A.

Initially, it should be observed that the Pennsylvania Superior Court's asserted basis for its conclusion, *i.e.*, that Rule 238 may properly be incorporated as an element of federal law, is well founded. The court accepted at the outset the principle that federal law, not local law, controls all damage questions in FELA cases tried in state courts and that prejudgment interest was, in fact, an item of substantive damages. Hence, the court indicated that if the award of prejudgment interest was to be affirmed the basis for so doing would have to be derived from federal law, not Pennsylvania law.

Such a basis was found in the federal general interest statute, 28 U.S.C. §1961 which provided in relevant part as follows:

> "Interest shall be allowed on any money judgment in a civil case recovered in a district court . . . . Such interest shall be calculated from the date of the entry of the judgment, at the rate allowed by State Law."[3]

The Superior Court recognized that §1961, while speaking expressly to the subject of postjudgment interest, was silent on the matter of prejudgment interest. Relying principally on *Olsen v. Shell Oil Co.*, 708 F.2d 976 (5th Cir. 1983), however, the court concluded that said silence should be interpreted not as prohibiting prejudgment interest but rather as making its award discretionary with the court. Said discretion should be exercised under the federal statute, according to the Pennsylvania Superior Court, when the award of prejudgment interest is supported by local law. In the present case, the local prejudgment interest rule, Pa.

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[3] Subsequent to the filing of the instant law suit, §1961 was amended. The parties to this litigation have at no time made a contention that said amendments are relevant to the present question.

Rule 238, provided the required local basis and, hence, the trial court's award of such interest was upheld by the Superior Court.

The Petitioner attacks the Superior Court's reasoning by noting that *Olsen* involved a cause of action filed under the Outer Continental Shelf Lands Act, 43 U.S.C. §1331 *et seq.* (hereinafter referred to as OCSLA) which, according to the Petitioner, "provides that state law controls and provides both substantive and remedial rights for plaintiffs suing thereunder." (Petitioner's Brief at p. 7). Rights and remedies under the FELA are, however, purely a matter of federal law says the Petitioner. By force of its own reasoning, therefore, Petitioner says that *Olsen* is inapposite to the instant issue.

Petitioner reads *Olsen* too narrowly. The OCSLA, like the FELA, is fundamentally a federal cause of action. The OCSLA notes in its opening provision that:

> "The Constitution and laws and civil and political jurisdiction of the United States are hereby extended to the subsoil and seabed of the outer Continental Shelf. . . ." 43 U.S.C. §1333(a)(1).

While a subsequent paragraph does indicate that the laws of the adjacent state are to be adopted "to the extent that they are applicable and not inconsistent with [the OSCLA] or with other Federal laws and regulations. . . ." 43 U.S.C. §1333(a)(2)(A), the cause of action created thereunder is, at heart, a federal one. As noted by this Court in *Rodrigue v. Aetna Casualty & Surety Co.*, 395 U.S. 352, 89 S. Ct. 1835, 23 L.Ed.2d 360, (1969), "it is evident . . . that federal law is 'exclusive' in its regulation of this area, and that state law is adopted only as surrogate federal law." *Rodrigue, supra,* at p.

357. The Court went on to note that state law will be adopted "only when no inconsistent federal law applied . . . ." *Rodrigue, supra,* at p. 358.

It should be noted that to the extent *Olsen* sanctions the incorporation of state law where gaps exist in the applicable federal law, it is merely reaffirming in a general way the basic provisions of the Judiciary Act of 1789, the very enabling legislation for much of the federal court system. Section 34 of that Act, popularly known as the Rules of Decision Act, 28 U.S.C. §1652, provides:

> "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the Courts of the United States, in cases where they apply."

This Act has been interpreted broadly to mean that unless an act of Congress or a provision of the Constitution speaks to a substantive issue, a district court must apply local substantive law in all civil cases. See generally, Wright, "*Law of Federal Courts,*" 3rd Ed. §60. This is so because, as Mr. Justice Brandeis remarked in *Erie, supra,* there is no constitutional authority for the creation of a general federal common law. *Erie, supra,* at p. 78.

Thus, to an extent all federal law admits of the possibility of incorporation of local law. And while it may well be true that the paucity of federal law under the OCSLA is such that resort to state law is occasioned much more frequently there than with the FELA, that circumstance illustrates only a difference in degree between the acts, not a difference in kind; both are

essentially federal causes of action. Thus, the Superior Court's application of *Olsen* to an FELA case was entirely proper.

Apart from attacking its specific reliance on *Olsen*, Petitioner and *Amici Curiae* argue at a more general level that the decision of the Superior Court should be reversed because it is at odds with established precedent and/or because it failed to apply the required analysis to the general federal interest statute, 28 U.S.C. §1961. With regard to this allegedly established line of authority refusing to grant prejudgment interest, (See Brief of Petitioner, p. 6, fn.1 and Brief of *Amici Curiae*, p. 2, fn.1), Respondent questions the existence of such "established authority." It may be said that in our system of jurisprudence "established authority" should only be used to describe a longstanding, definitive statement emanating from this Honorable Court. If that premise be accepted, there is no established authority in this area for no opinion of this Court has ever indicated that the award of prejudgment interest in an FELA case is improper. On the contrary, from this Court's only pronouncement which is relevant to the case at hand, *Louisville and Nashville Railroad v. Stewart*, 241 U.S. 261, 36 S. Ct. 586, (1916) an implication can be drawn that the award of such interest is warranted here. In *Stewart*, this Court affirmed a trial court's application of a Kentucky postjudgment interest statute to an FELA suit.[4] And for present purposes there is little distinction to be drawn between postjudgment and prejudgment interest rules. Thus, to the extent that any guidance has emerged from this Court, it is supportive of, not contrary to, the Superior Court's opinion.

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[4] The Petitioner makes the unfounded observation that *Stewart* sanctioned the interest award "on the basis of the federal general interest statute." Brief of Petitioner, p. 8. Respondent wished to note that nowhere in its opinion does the Court even mention the federal interest statute, let alone rely upon it.

As to the "proper" analysis of §1961 allegedly employed by other lower courts but absent in the Superior Court's opinion, Respondent submits that the Superior Court's reasoning was indeed proper. It should be observed that both the Petitioner and *Amici Curiae* concede that, under *Rodgers v. United States*, 332 U.S. 371, 68 S. Ct. 5, 92 L.Ed.3 (1947), the award of prejudgment interest under §1961 is not absolutely prohibited but rather is a decision which rests within the discretion of the trial court. Their argument, however, is that such discretion should not be exercised unless the award of interest is consistent with general equitable principles or with the Congressional intent underlying the particular statute at hand, neither of which circumstance prevails here. Relying principally on *Camplese v. Consolidated Rail Corporation*, 594 F.Supp. 44 (M.D. Pa. 1984), and *Carver v. Consolidated Rail Corporation*, 600 F.Supp. 125 (E.D. Pa. 1984), the Petitioner and *Amici Curiae* argue that the FELA, as written, has adequately and fairly adjusted the equities between the railroad and its injured employees[5] and that to enhance personal injury recoveries with prejudgment interest would disrupt the said balance. Furthermore, it

[5] With respect to the said balance, Respondent reads with some amusement the rather forlorn observation made by *Amici Curiae* to the effect that the principles of law applicable to the FELA are so heavily weighted in the employee's favor that "a defense verdict in an FELA action comes as news of the 'man bites dog' variety." Brief of *Amici Curiae*, p. 5. fn.3. *Amici Curiae* have apparently overlooked the fact that injured railroad workers, unlike other employees covered by various workmen's compensation statutes, must establish negligence of their employer as a condition precedent to any recovery. For any trial attorney who has struggled to develop a theory of liability against a carrier where an objective appraisal of the facts admits of no greater employer culpability than the fact that the "accident" occurred on its premises, such an oversight is by no means minor. In short, the "adjustment of equities' under the Act is such that one need hardly heed the woebegone implication of the *Amici Curiae* that the railroads are somehow in need of tag days.

is argued that the application of a local prejudgment interest rule would undermine the uniformity in compensation which Congress allegedly sought to achieve by enacting the FELA. Neither of these arguments is sufficiently compelling, however, to disturb the Superior Court's ruling.

To the argument that the awarding of prejudgment interest would disrupt an established balance of equities, Respondent urges the contrary view, to wit, that permitting such interest furthers the relationship which Congress sought to achieve between the railroad and its injured employees. As this Court has observed with regard to the FELA, "[I]t is clear that the general Congressional intent was to provide liberal recovery for injured workers ...." *Kernan v. American Dredging Company*, 355 U.S. 426, 428, 78 S. Ct. 394, 398, 2 L.Ed. 2d 382 (1958). Awarding prejudgment interest is consistent with that expressed intent for, as noted in *Garcia v. Burlington Northern R.R.*, 597 F.Supp. 1304 (D.C. Colo. 1984), such payments (a) provide complete recovery for plaintiffs who have been forced to exist without admittedly due monies for sometime prior to trial; (b) establish some equality of recovery among injured workers by eliminating delay as a factor effecting the true value of an award; and (c) discourage railroads from prolonging litigation, thereby denying justice to the employee and generally frustrating the courts' attempts to efficiently administer their business. Thus, by awarding prejudgment interest to your Respondent the Superior Court helped to effectuate, not frustrate, the underlying purpose of the FELA.

As to the argument that application of Rule 238 disturbs the uniformity of results desired under the FELA, Respondent's reply may be succinctly stated as

follows. First, lack of uniformity is an inherent, anticipated by-product of the concurrent jurisdiction scheme established by Congress regarding FELA actions. Such suits may be filed in the courts of each of the fifty states, and it is conceded by all concerned that when a state forum is selected, local law will govern all matters of procedure. See generally *Annotation*, 79 ALR 2d 553. Because procedural matters can obviously effect the outcome of cases, it follows that the result obtained in an FELA suit tried in Pennsylvania may differ substantially from that to be had in a neighboring state. Thus, the mere fact that application of Rule 238 may produce a damage award different from that which would be obtained elsewhere is by no means a novel occurrence in an FELA suit.

Furthermore, our federal system is replete with instances where, because of the incorporation of state law, federal causes of action may yield different results depending upon the state in which the action is brought.[6] In short, the sort of uniformity which Petitioner and *Amici Curiae* submit is so vital to the effective

[6] For example, it has been held that the following issues arising in the context of various federal causes of action are to be determined according to local law, thereby setting up the possibility of non-uniform results: the applicable statute of limitations in a civil rights case under 42 U.S.C. §1983, *Board of Regents v. Tomanio*, 446 U.S. 478 (1980); the question of damages in a personal injury action under the Federal Aviation Act, 49 U.S.C. §1374, *Nader v. Allegheny Airlines*, 512 F.2d 527 (D.C. Cir. 1957); whether a debtor may assert the common law defense of coverture in an action brought for default on a federal S.B.A. loan, *U.S. v. Yazell*, 382 U.S. 341 (1966); whether an illegitimate son qualifies as the "child" of a copyright owner under the federal copyright law, *Desylva v. Ballentine*, 351 U.S. 570 (1956); the nature of one's "property" interest in a fourteenth amendment claim for deprivation of property without due process, *Board of Regents v. Roth*, 408 U.S. 564 (1972); and in the federal racketeering statute (R.I.C.O.), the meaning to be applied to terms such as murder, kidnapping, arson, bribery, etc. 28 U.S.C. 1961.

vindication of the underlying purpose of the FELA is habitually absent in our federalist scheme and is tolerated quite well by the system. Therefore, any lack of uniformity which may be occasioned by the application of prejudgment interest in this case should not provide a basis for vacating the Superior Court opinion.

B.

As is evident from the above discussion, the Superior Court applied Rule 238 as a matter of federal law. This Court may, however, elect to let stand the Superior Court's ruling on an alternative basis not expressed by the Pennsylvania Court. This Court can logically conclude that Rule 238 is essentially procedural in nature, not substantive; and if so, that it applies here as a matter of *state* law since, as noted previously, local law controls matters of procedure in FELA suits brought in state courts. An examination of the nature and purpose of Rule 238 suggests that such a characterization is indeed proper.

Rule 238 was enacted by the Pennsylvania Supreme Court in its rule-making capacity. That court later commented on the purpose of the rule by stating, "Undeniably, this rule serves to compensate the plaintiff for the inability to utilize funds rightfully due him, but the basic aim of the rule is to alleviate delay in the disposition of cases, thereby lessening congestion in the courts." *Laudenberger v. Port Authority of Allegheny County,* 436 A.2d 147 (1981).[7] The peculiar workings of

[7] In support of its interpretation of the purpose behind Rule 238, the Pennsylvania Supreme Court relied primarily on the explanatory comments made by the Civil Procedural Rules Committee which noted the following:

(Footnote continued on following page)

the Rule reflect that considered purpose. Rule 238 damages are not automatically awarded to all plaintiffs, and their award is not at all related to the nature and severity of the plaintiff's injury. The applicability of the rule in any particular case is solely a function of the relationship between the size of the verdict and the settlement offer made by the defendant. Thus, by its provisions Rule 238 states that no prejudgment interest is to be awarded unless the verdict exceeds 125 percent of the defendant's settlement offer. Furthermore, the item of prejudgment interest, unlike lost wages for example, is a matter never presented to the jury; it is a post-trial remedy invoked by the court.

(Footnote continued from preceding page)

> "The judicial system has long been vexed by the problem of congestion and delay in the disposition of civil actions for bodily injury, death or property damage pending in the trial courts. Various techniques, such as compulsory arbitration, have helped to dispose promptly of the bulk of such cases in amounts under $10,000 in Philadelphia and Allegheny Counties and under $5,000 in other counties which have adopted compulsory arbitration. Nevertheless, there is still a considerable residue of so-called major cases not presently subject to arbitration which require further proceedings in the trial courts.
>
> "Statistics show that ... [t]hirty-eight percent are settled without going to trial. Some are settled through pretrial conciliation techniques, but in too many cases meaningful negotiations commence only after a trial date is fixed or on the courthouse steps or in the courtroom, thus leading to delay in the disposition in the courts. The present practice provides no incentive for early settlement.
>
> "In the usual civil action for bodily injury, death or property damage there is no compensation to the successful plaintiff and no sanction against the defendant for the long delay between the commencement of the action and the trial."

Viewed in the above light, it is clear that Rule 238 has been fashioned not for the purpose of increasing the substantive damages of plaintiffs, but for the limited purpose of alleviating a particular state problem, namely, congestion on the civil docket. There is no meritorious reason why, for a select group of cases, this *procedural* attempt to deal with a *procedural* problem should be frustrated. Congress has approved the trial of FELA cases in state court. It stands to reason, therefore, that as FELA litigants are subject to all local rules regarding other procedural matters such as the cost of filing suit, the nature and extent of discovery, etc., so too should they be subject to a prejudgment interest rule promulgated to aid the court in the administration of its business. As a matter of purely local procedure, therefore, this Court may let stand the ruling of the Superior Court that Rule 238 applies to an FELA case tried in state court.

ARGUMENT II

As to the Petitioner's argument that Rule 238 is unconstitutional, the Superior Court correctly ruled that said argument had been waived. While it is true that Petitioner's post-trial motion made passing reference to the due process and equal protection implications of Rule 238, no mention of any alleged constitutional infirmity was made in either the brief or oral argument offered in support of the said motion. It is clear, therefore, that by the time the issue was presented to the trial court for resolution the constitutional argument had been abandoned.

Conclusion

Because the ruling of the Superior Court may be sustained as a matter of federal law or purely local law, the within Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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Certificate of Service

The undersigned, who is a member of the bar of this Court, hereby certifies that three copies of the within Brief of Respondent in Opposition of Petition for Writ of Certiorari were served on the following individuals by first class mail, postage prepaid on June 28, 1985. I further certify that all persons required to be served have been served.

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